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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY COURIER

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W. -- Room TWB-204
Washington, D.C. 20554

Re: *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhance Services*, CC Docket No. 95-20
1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguard and Requirements, CC Docket No. 98-10

Dear Ms. Salas:

Pursuant to the Commission's Public Notice of March 7, 2001, enclosed for filing in the above-captioned matters is an original plus four copies of the Reply Comments of AT&T Corp. Thank you for your attention to this matter and please call me with any questions.

Sincerely,

Daniel Meron /mys

Daniel Meron

Enclosure

cc: Janice Myles, Common Carrier Bureau (2 copies)

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Before the
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REPLY COMMENTS OF AT&T CORP.

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice,[1] AT&T Corp. ("AT&T") respectfully submits the following reply comments.

INTRODUCTION AND SUMMARY

In its initial comments, AT&T demonstrated that (1) there is no basis for removing the current ONA unbundling safeguards given the BOCs' continued dominance of the essential local exchange facilities that enhanced service providers require to compete with the BOCs; (2) the Commission's regulations implementing the local competition provisions of the 1996 Act serve a distinct purpose from the ONA unbundling requirements, and therefore do not justify eliminating the ONA regulations; and (3) given that nonstructural safeguards have not yet been effective in rapidly opening markets to competition, the Commission should require BOCs to implement complete structural separation of their retail and wholesale units, as the Ninth Circuit indicated

[1] Public Notice, *Further Comment Requested to Update and Refresh Record On Computer III Requirements*, CC Docket Nos. 95-20, 98-10, DA 01-620 (released March 7, 2001). *See* 66 Fed. Reg. 15064 ("Public Notice").

would be appropriate under such circumstances. *See California v. FCC*, 39 F.3d 919, 930 (9th Cir. 1994) ("*California III*").

The comments confirm each of these points. First, with the exception of the BOCs, the commenters unanimously agree that, as the Commission indicated in its earlier notice in 1998,[2] the BOCs continue to control the essential local facilities that provide them with the incentive and the ability to interfere with the competitive offerings of other enhanced service providers. As they have in the past, the BOCs make astounding and unfounded assertions that local competition is rapidly growing, that the bottleneck has been entirely eliminated, and that any anticompetitive conduct is not even possible. But those claims are starkly refuted by the hard data produced by commenters in this proceeding and elsewhere showing, *inter alia*, that many enhanced service providers attempting to compete with the BOCs are on the verge of (or in) bankruptcy, that BOCs still control over 90 percent of the local telephone lines, and that BOCs have continued to engage in anticompetitive conduct that favors their own enhanced services operations and that harms the service offerings of competitors. For these reasons, the ONA unbundling safeguards should be retained.

Second, the comments also support the conclusion that the Commission's regulations under Section 251 of the Act serve a different function than the ONA rules, and that the Act's unbundling requirements therefore do not eliminate the need for ONA safeguards. Even Qwest, which operates as a BOC and an enhanced service provider competing against other BOCs, recognizes that Section 251 unbundling regulations generally do not remove the need for BOCs to make ONA services available to enhanced service providers. Qwest at 7. The other BOCs

[2] Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 FCC Rcd. 6040, 6090-91 (1998) ("*1998 FNPRM*").

make no serious effort to argue otherwise, but only take this opportunity to repeat their claims that the ONA regulations should be lifted based upon their view that there must be "regulatory parity" between BOCs and cable providers. But as AT&T has shown, Congress wisely has recognized that cable systems are fundamentally different than the BOCs' monopoly local exchange networks, and has established a different regulatory structure.

Finally, the non-RBOC commenters agree that structural separation of the BOCs into retail and wholesale units is appropriate, particularly given the BOCs' continued dominance of essential local exchange facilities and the current ineffectiveness of non-structural safeguards to constrain the BOCs' use of those facilities to impede competition in enhanced services. Given these circumstances, the Commission cannot make the showing that the Ninth Circuit has required for rejection of a structural separation requirement. *California III*, 39 F.3d at 930. Indeed, the comments demonstrate that structural separation is even more appropriate now that the market is beginning to demand bundles of traditional service with enhanced services like DSL. Currently, the BOCs are uniquely positioning themselves to offer such bundles. True structural separation could assist regulators and competitors in detecting whether the BOCs' success in marketing such bundles is based on the merits of their services or instead upon their ability to structure their services to obtain unfair advantages from their control of essential local facilities – advantages that they then deny to unaffiliated providers of enhanced services seeking to offer competing bundles.

I. THE BOCs SHOULD CONTINUE TO BE REGULATED UNDER THE COMPUTER III NON-STRUCTURAL SAFEGUARDS.

A wide array of commenters support AT&T's position that the ONA unbundling rules should be retained. *E.g.*, AISPA at 2, 5; USISPA at 11; CIX at 9; Earthlink at 4. In particular, the comments compellingly demonstrate that the Commission's conclusion in 1998 that BOCs "continue to have the ability and incentive to engage in anticompetitive behavior against competing ISPs" remains equally true today. *1998 FNPRM* at 6072-73. That is because, as GSA states, there still is "very little facilities-based competition in most areas," and incumbent LECs therefore remain "the only carriers with ubiquitous access facilities." GSA at i; *see also* AISPA at 2, 5; Brand X at 9; USISPA at 9; CIX at 13; Earthlink at 7. Indeed, the "BOCs share of the local exchange market remains in excess of 90 percent – down only a few percentage points since 1998." ITAA at 7-8 & n.16 (citing Commission local competition reports finding an ILEC market share of 97 percent in December 1998 and remaining at 93 percent in August 2000).

Because the BOCs continue to dominate local markets and maintain the incentive and ability to harm ISP competitors, "[t]he Commission's ONA rules are a very important, albeit presently under-performing, asset for ISPs." CIX at 9. Indeed, Qwest – which acts as both a BOC and an ISP that competes against other BOCs – admits that "ILECs provide essential inputs for enhanced service providers seeking to serve residential and small business customers" and appears to support retention of the current ONA rules to ensure access to those essential inputs. Qwest at 3, 4. Further, Qwest's comments demonstrate that, contrary to the claims of certain commenters, ISPs continue to rely on the current ONA requirements in developing new competitive services. Qwest at 13 (describing recent requests by ISPs under the ONA regulations).[3]

[3] Certain ISP commenters claim that ONA has been ineffective, *e.g.*, WorldCom at 5; NHISP at 1; ITAA at 14, but that does not support eliminating the ONA safeguards. To the contrary, these comments support the need for a "reinvigorated" form of the existing ONA safeguards. Earthlink at 4 (Commission should "act here to reinvigorate its *Computer III* regime to promote ISP competition"); ITAA at 21-27. Moreover, as the Commission previously recognized, "merely because a safeguard may not be entirely effective in all cases" does not mean that "it should not be used at all." Report & Order, *In the Matter of Computer III Further Remand Proceedings*, 14 FCC Rcd. 4289, ¶ 23 (1998) ("*Biennial Review*").

Predictably, most of the BOCs assert that the Commission's ONA requirements should be entirely eliminated, Verizon at 3-13; SBC at 1, 5-9; BellSouth at 2-6; USTA at 4-7, but these claims are based on logical inconsistencies and self-serving and wildly inaccurate views of the state of local competition. Thus, alone among the commenters, SBC and Verizon assert that local competition is "growing rapidly" and is so "widespread" (SBC at 2, 4) that the BOCs' control of bottleneck facilities is "rapidly disappearing" or even has been completely "eliminated," such that it is "not even . . . possible" for BOCs to engage in anticompetitive practices. Verizon at 2, 6; SBC at 2, 5. Those assertions – which the BOCs have been proclaiming for years to be true – are not remotely credible and are starkly inconsistent with the evidence set forth in the comments and compiled by the Commission showing that BOCs retain a huge market share and that competing providers are disappearing at an alarming rate.[4]

In fact, if anything, the risk of anticompetitive behavior by the BOCs has *increased* since 1998. In reviewing the numerous mergers that have reduced the number of large incumbent LECs from eight to just four, the Commission has repeatedly found that those mergers "increas[ed], from pre-existing substantial levels, the ability and incentive of the merged entity to discriminate against the providers of advanced services."[5] In particular, the Commission found that this anticompetitive conduct toward competing providers occurred "frequently" and was

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[4] SBC (at 4) relies on data showing that the number of unbundled access lines provided by CLECs has doubled, but the fact remains that the approximately 3 million lines served by CLECs is dwarfed by the 167 million access lines served by incumbent LECs. Likewise, SBC's reliance (*id.*) on the Commission's approval of Section 271 applications in five states by no means shows that local competition is widespread: to the contrary, that fact only reinforces that in at least 45 states, local markets remain unopened to competition by any measure.

[5] Memorandum Opinion and Order, *Application of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control*, 14 FCC Rcd. 14712, ¶ 207 (rel. Oct. 08, 1999) ("*SBC-Ameritech Merger Order*"); *see also* Memorandum Opinion and Order, *Application of GTE Corp. and Bell Atlantic Corp. For Consent to Transfer Control*, 15 FCC Rcd. 14032, ¶¶ 170-85 (rel. June 16, 2000) ("*Bell Atlantic-GTE Merger Order*").

especially likely "the first time [competing providers] seek to provide a new service such as xDSL that is dependent on incumbent LEC inputs, thus giving the incumbent LECs the ability to control the pace of innovation." *SBC-Ameritech Merger Order* ¶ 197; *Bell Atlantic-GTE Merger Order* ¶ 181-82. These conclusions demonstrate precisely why the Commission, at a minimum, should retain the ONA safeguards, which were expressly designed to "permit enhanced service providers to achieve *maximum flexibility* in gaining access to telephone transmission facilities thereby allowing them to offer *innovative packages* of services to consumers." *California III*, 39 F.3d at 927 (emphasis added). The ONA safeguards, if appropriately implemented and enforced, can thereby serve as a valuable tool in constraining the BOCs' ability to use their monopoly control of bottleneck facilities to limit competitive offerings, and particularly new services. *E.g.*, CIX at 9

The retention of the ONA safeguards is also important given that these mergers have "severely handicapp[ed] the ability of regulators and competitors to use comparative practices," or benchmarking, to detect anticompetitive conduct. *SBC-Ameritech Merger Order* ¶ 101. Such benchmarking was another of the nonstructural safeguards, in addition to ONA, that the Commission relied upon in deciding to eliminate structural separation. *California III*, 39 F.3d at 927. Because mergers have reduced the efficacy of benchmarking, it is all the more difficult to explain how nonstructural safeguards alone can effectively reduce BOCs' ability to engage in anticompetitive conduct.

Apart from their self-serving boasts regarding the state of local competition, the BOCs' other arguments against the ONA unbundling rules are complete non-sequiturs. BellSouth, for instance, asserts that the "current [ONA] safeguards are not required" because "BellSouth has complied with [those] requirements." BellSouth at 3. Far from justifying removal of those safeguards, however, the BOCs' alleged compliance with them could only demonstrate that the safeguards are needed to continue to prevent them from acting upon their incentives to handicap competing ISPs. Indeed, BellSouth's pledge (*id.*) to continue to offer these capabilities even absent regulation is loaded with the typical exceptions that portend the BOCs' use of their monopoly power to prevent competing ISPs from gaining the access to the essential facilities that ISPs require. Thus, BellSouth claims (*id.*) that it will "continue to offer" ONA capabilities, but only if "technically feasible" and "where warranted by market demand" – precisely the pretexts that BOCs typically provide to justify their anticompetitive conduct. *See SBC-Ameritech Merger Order* ¶ 205.

In all events, BellSouth's claim that the BOCs have complied with the ONA requirements is refuted by numerous comments. Commenters have presented numerous instances where, even with the ONA rules in effect, BOCs have engaged in the very anticompetitive practices that they claim are no longer even possible. *See also SBC-Ameritech Merger Order* ¶ 206 (noting that "the record here is replete with assertions of discrimination against competing xDSL providers"). For example, as Brand X shows, BOCs have "been selling basic DSL service for $39.95 per month, retail, to consumers. . . . [while competing] ISPs must pay $39.00 wholesale for this same line." Brand X at 6. The reason that the BOCs' ISPs can offer their services at such prices is because "[t]hey simply aren't paying the same price." *Id.* As the comments demonstrate, BOCs often provide volume discounts for DSL lines which are improperly crafted to provide that BOCs' own ISPs receive lower prices, but that "[n]o other ISP qualifie[s] for similar pricing." *Id.* at 7; WorldCom at 4-5; CISPA at 16-18; Earthlink at 11-12 (volume discounts not based on true cost efficiencies "mask discrimination"). The record is filled with other examples of the BOCs' ability to impede competing ISPs' service offerings. *See, e.g.*, Brand X at 5-9; Earthlink at 9-18; NHISP at 2-5; EVoice at 7, 12-25; CIX at 7-8; CISPA at 8-28; AISPA at 5-15 (all describing instances of discriminatory conduct by BOCs that could be addressed via ONA safeguards). For all of these reasons, the ONA safeguards should be retained as another mechanism to prevent these instances of anticompetitive conduct.

II. THERE IS WIDESPREAD AGREEMENT THAT THE SECTION 251 UNBUNDLING REQUIREMENTS PROVIDE NO BASIS FOR RELAXING THE SCOPE OF THE ONA UNBUNDLING OBLIGATIONS.

The comments also support AT&T's position that the unbundling requirements of Section 251 of the Act do not provide a basis for lessening the scope of the ONA unbundling obligations. USISPA at 8-9; WorldCom at 7-9; Qwest at 7-8. Even Qwest admits that "the existence of Section 251(c) unbundling opportunities does not, by itself, obviate the necessity that ONA services be made available to enhanced service providers in the manner which best meets their needs." Qwest at 7. That is because, as the Commission has recognized and as commenters explained, "ONA unbundling is quite different from the unbundling required under Section 251" because ONA unbundling applies to services, while section 251 unbundling applies to network facilities and functions. Qwest at 7; AT&T at 7 (citing *1998 FNPRM* ¶ 93).

The remaining BOCs do not seriously dispute that ONA unbundling is distinct from the unbundling required by Section 251.[6] Instead, they raise once again the claim that cable operators should be subject to similar unbundling and access requirements in order to create "regulatory parity" between cable operators and LECs. As AT&T has already demonstrated, these claims are entirely without merit. *See* Comments of AT&T Corp., GN Docket 00-185 (Excerpt included as Attachment 1). Cable systems are fundamentally different from the BOCs' monopoly local exchange networks, both in terms of their technical capacity to accommodate

[6] Those BOCs assert that the 1996 Act and Section 251(c) have opened the local market to competition, but, as described above, those claims are simply not true.

multiple ISPs and their positions in the marketplace. That is why Congress imposed such fundamentally different regulatory schemes on the different entities. These BOCs' abstract notions of "regulatory parity" cannot support the elimination of regulatory safeguards like the ONA regulations that are justified by the BOCs' enduring monopoly power and resulting incentives and ability to obstruct competition.

III. NUMEROUS COMMENTS SUPPORT STRUCTURAL SEPARATION OF THE BOCS INTO DISTINCT WHOLESALE AND RETAIL UNITS.

Under the framework established by the Ninth Circuit in *California III*, the fact that BOCs still retain market power that is not constrained either by Section 251 unbundling or by other nonstructural safeguards, including ONA, inevitably leads to the conclusion that the Commission should require the BOCs to maintain structurally separate wholesale and retail units. *California III*, 39 F.3d at 930. As the comments demonstrate, requiring the BOCs to maintain retail and wholesale operations that are truly separate can help regulators and competitors to detect discriminatory conduct. AISPA at 24-25; USISPA at 12; ITAA at 18-19; WorldCom at 5; GSA at 6-7; Brand X at 9, 11; CISPA at 30-31; CIX at 4; Earthlink at 5. In particular, it has been long-recognized that use of a truly separate affiliate for retail and wholesale operations can help to ensure that competing ISPs in fact obtain the same non-discriminatory access to essential inputs. *California III* at 924.[7]

Furthermore, as WorldCom and other commenters demonstrate, structural separation as a regulatory tool is now all the more useful given the increasing emphasis on bundling of enhanced services with traditional telephone services like local and long distance services. *E.g.*,

[7] Indeed, SBC expressly relies on and quotes from a prior Commission Order stating that "structural separation protects against discriminatory interconnection *better than do nonstructural safeguards*." SBC at 13 (quoting *Biennial Review*, ¶¶ 33-34) (emphasis added by SBC).

WorldCom at 8; CIX at 9-10; CISPA at 2. Consumers are increasingly demanding voice and high speed data services over a single line. Incumbent LECs are already satisfying that demand today and have made clear they consider the ability to offer voice and data services over a single line a significant competitive advantage.[8] If competitors lack the ability to offer both voice and data services over a single loop, they would be at a severe competitive disadvantage in the vast majority of the nation where there is no other facility over which both services can be provisioned. Continued regulation is therefore necessary to prevent these BOCs from leveraging their longstanding monopolies over local phone service into the market for provision of bundles of local voice services, data services, and (once authorized) long distance services. *E.g.*, WorldCom at 6; CIX at 7-8; CISPA at 9-10.

The critical advantage the BOCs enjoy in seeking to offer these bundles is their unique control over the customer's local loop. *See* Qwest at 3 ("ILECs provide essential inputs for

[8] *SBC Launches $6 Billion Broadband Initiative to Transform It Into America's Largest Single Broadband Provider*, Business Wire (Oct. 18, 1999) (quoting SBC CEO Ed Whitacre as stating that "[b]y converting the 'last mile' into a high-speed 'first mile' on-ramp to the Internet, [SBC is] making nearly all of [its] approximately 60 million access lines more powerful for customers and more valuable to shareholders...Project Pronto [*i.e.*, SBC's DSL service], together with [its] expanding service footprint and plans to provide long-distance service, is an integral part of our plan to be a full-service, global provider and the only communications company our customers need") ; Dick Kelsey, *Qwest 3Q Profit Up 18 Percent*, Newsbytes (Oct. 24, 2000) (reporting Qwest's CEO Joseph Nacchio has stating that Qwest intends to push "bundled" voice/data services to its customers); *Verizon Posts Strong Third Quarter Revenue Growth on Sustained Demand for High-Growth Services* (Oct. 30, 2000) <http://investor.verizon.com/news/VZ/2000-10-30_X294729.html> (quoting Verizon President and co-CEO Ivan Seidenberg as stating that "'With the premier set of local wireline and wireless assets in the industry, we have the right platform – a fiber-rich, data-centric network architecture – on which to build a truly integrated bundle of broadband communications services that will create value for customers and shareholders'"); Duane Ackerman, *Take Another Look at BellSouth* (Oct. 4, 2000) (http://www.bellsouth.com/investor/100500goldmansachs.doc) ("we have last-mile connectivity to our customers. In case you haven't noticed, this is a scarce asset, ... [w]e have the most robust local network in the U.S., if not the world. Through prudent and consistent levels of investment, we are leveraging this asset by systematically transforming the network to digital broadband and IP.").

enhanced service providers seeking to serve residential and small business customers"). That lets the BOCs – unlike competing ISPs – provision advanced services to their embedded base of voice customers with a minimum of cost and disruption. As this Commission has found, the provision of advanced services over the same loop as the customer currently uses for voice service is far and away the most economical, efficient, and trouble-free approach.[9] To be able to compete fairly with the BOCs, competitors need the same access to the BOCs' essential loop facilities that the BOCs enjoy. *See* Earthlink at 8 ("BOCs' ISPs dominate DSL offerings not necessarily due to superior service, preferred offerings, or better rates but simply because they are able to structure their relationships with their parent companies to impede competitors"); CIX at 9-10. As the comments set forth, "structural separation will facilitate enforcement of the antidiscrimination rules that are critical to the survival and success of ISPs" seeking to offer bundles of voice and high-speed data services in competition with the BOCs' bundles. *See, e.g.*, WorldCom at 8.

The BOCs, once again, raise a host of objections to any rigorous separation requirements, but each of these claims is without merit. First, the BOCs claim that structural separation "serve[s] only to increase costs;" in particular, Verizon asserts that it would cost "at least $100 million" to move its retail operations into a separate subsidiary. Verizon at 7-8. But as ITAA and other commenters point out, Verizon's figure is grossly inflated, particularly in light of the fact that the Act requires BOCs to create a separate subsidiary for its in-region interLATA services. ITAA at 20 & n.48. Moreover, Verizon's assertions are squarely contradicted by the conditions that it proposed for its merger with GTE: Verizon voluntarily agreed to offer

[9] *See* Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 20912. ¶¶ 32-56 (rel. Dec. 09, 1999) ("*Line Sharing Order*").

advanced services through a nominally separate subsidiary, and it nowhere contended that such a condition would cost it anywhere near $100 million. *See Bell Atlantic-GTE Merger Order* ¶ 260. Given that such separate affiliates already exist for many BOCs, the additional costs needed to make these affiliates truly separate in all respects should not be significant. ITAA at 20.[10]

Indeed, having already created, pursuant to its merger conditions, a nominally separate affiliate to provide advanced services, SBC raises an alternative argument: it claims that, "as long as the structural separation requirements are in place, there is no risk of discrimination" and therefore no basis for imposing "legacy BOC regulations" like ONA safeguards onto any BOC separate affiliate. SBC at 13. SBC's argument is without merit. First, even if a BOC's retail and wholesale operations were separated, the BOC would retain all of its current incentives to favor its affiliate; separation could simply make detection of discrimination easier. But as the Commission has recognized, "it is impossible for the Commission to foresee every possible type of discrimination, especially with evolving technologies." *SBC-Ameritech Merger Order* ¶ 206. Thus, contrary to SBC's claim, structural separation does not ensure that there is "no risk of discrimination."

Second, and as the comments demonstrate, structural separation can be an effective mechanism for detecting discrimination only if the BOCs' retail and wholesale operations are truly separate. CISPA at 30 ("At a minimum, complete, rather than feigned, structural separation . . . should be ordered"); Brand X at 8; Earthlink at 5. But as AT&T has demonstrated on

[10] Verizon also raises the vague and entirely unsupported assertion that structural separation deters "new investment in innovative technologies." Verizon at 2, 11. But with respect to broadband, as the Commission has found and as noted above, BOCs have not hesitated to invest billions in deploying DSL facilities despite the separate affiliate structure put in place in the Merger Orders. Moreover, the most significant delay in investment in DSL came not because of regulatory requirements, but because BOCs refused to deploy the necessary technology out of a "concern that it would negatively impact their other lines of business." *Broadband Today*, Staff Report to William Kennard, at 27 (October 1999).

numerous occasions, and as other comments confirm, the separate advanced services affiliates put in place under the BOCs' merger conditions are not truly separate from their affiliated BOC, and in fact remain so closely integrated with that BOC, its bottleneck facilities, and other benefits of incumbency that the risk of discrimination against competing providers remains substantial. Brand X at 8 (current affiliate is a sham); *see* Brief of AT&T Corp. in *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (Attachment 2) (describing numerous advantages SBC's data affiliate inherited and continues to maintain from SBC's LEC operations, including brand names, existing customer accounts, and exclusive access to collocation space not provided to competitors). Indeed, the D.C. Circuit vacated the portion of the *SBC-Ameritech Merger Order* that relieved SBC's separate advanced services affiliates of their obligations under section 251 of the Act. *ASCENT*, 235 F.3d at 668.[11] Thus, while structural separation can be an effective mechanism to detect BOC discriminatory conduct, that is true only to the extent that the separation mandated is significant enough to allow a meaningful comparison of the treatment provided by the BOCs' wholesale operations to its BOC affiliate versus that received by its competitors.

[11] SBC claims that this decision was "specific to section 251" and in no way "impugn[s] the Commission's conclusion . . . that SBC's advanced services affiliates lack market power." SBC at 14. But that is simply false: although the Court simply did not need to decide whether the numerous forms of discrimination that AT&T described made the Commission's decision unlawful, the Court squarely rejected the conclusion that the affiliates necessarily lack market power. As the Court stated, if that were true, then "it is not apparent why a separate affiliate would be necessary – or even useful. It could be thought that the affiliate structure is a non-sequitur if an ILEC cannot use its local loop monopoly to leverage its position in the advanced service[s] market." *ASCENT*, 235 F.3d at 668.

Respectfully submitted,

By: /s/ Daniel Meron

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Dated: April 30, 2001

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I hereby certify that on this 30th day of April, 2001, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. to be served by first class mail on the following:

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	**GN Docket No. 00-185**

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Despite – or perhaps because of this far-reaching regulatory – involvement, forced access in Canada is still a theoretical goal rather than a concrete reality. Task Information Forms recently developed by an industry steering committee to help formulate remaining regulatory steps adddress such matters as responsibility for providing information related to the provision of MAC addresses in the cable carrier's DHCP server; identification of information necessary to traffic forecasting and other network functions; the need for guidelines regarding physical interconnection of ISPs to cable plants; and procedures regarding the transferring of an end-user between a cable carrier and an ISP or between ISPs. Looking north, cable operators, regulators, and ISPs have borne the cost of forced access – in terms of resources, uncertainty, and never-ending regulation – without obtaining the promised benefits.

IV. MISGUIDED NOTIONS OF "REGULATORY PARITY" CANNOT JUSTIFY CABLE INTERNET ACCESS REGULATION OR THE ABANDONMENT OF CORE REGULATION AIMED AT LOCAL EXCHANGE MONOPOLIES.

As the foregoing discussion confirms, both law and policy compel the conclusion that the Commission should maintain the *status quo* of market-based oversight of cable Internet services. It does not follow, however, that the same market-based approach can or should be imported to telecommunications or other networks that Congress and the Commission have always, and quite properly, treated differently. Rather, any determination whether the Commission may or must regulate access to different "networks that rely on different network architectures and transmission paths," NOI ¶ 43, necessarily turns on the particular regulatory frameworks that Congress established for such networks. In the 1996 Act, for example, Congress *mandated* regulation of the terms of access to the bottleneck telephone networks of dominant incumbent LECs. *See* 47 U.S.C. § 251(c)(3). As the Commission has repeatedly held, those access obligations apply with full force in the context of broadband services, and the Commission has no discretion to forbear from enforcing them until they are fully implemented.[217]

In any context in which Congress has left the decision whether or not to impose regulation to the Commission's sound discretion, the decision should likewise account for the particular benefits and burdens of access regulation in that context. In all such determinations, the Commission should, of course, be guided by one universally accepted economic and public policy principle: regulators should not dictate the terms and conditions under which a firm provides access to its facilities unless there is a risk of abuse of a bottleneck monopoly. *See* Ordover and Willig Decl. ¶¶ 11, 14.

The Commission's existing broadband policies and regulations are fully consistent with that principle. The general rule, applicable to cable, satellite, and wireless broadband networks, is that the terms and conditions of access are determined in the marketplace, because no bottleneck monopoly threatens the full and fair play of market forces. The sole exception is access regulation of the telephone networks of incumbent LECs, where the very real risk of bottleneck monopoly abuse easily justifies both the section 251 access regulation imposed by Congress and the Commission's own *Computer II* "tying" prohibition. As the Commission recently explained to the D.C. Circuit, the incumbent LEC's local "loops" remain "a quintessential bottleneck facility for competing telecommunications carriers." FCC DSL Br. at 22. Until the incumbents' voice monopolies are broken, existing regulation will therefore remain necessary to prevent them from using their control over facilities used simultaneously to provide both voice and advanced services to "perpetuate their monopolistic dominance" of "existing" markets and to leverage that dominance into "emerging" markets. *Id.*

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[217] See, e.g., Memorandum Opinion and Order, *Deployment of Wireline Services Offering Advanced Telecommunications* Capability, 13 FCC Rcd. 24012 ¶¶ 11, 72 ("*Section 706*

In these circumstances, no legitimate notion of "regulatory parity" or "competitive neutrality" could, at the present time, support altering the *status quo* to impose "the same regulations on different types of providers of high-speed services." NOI ¶ 45. Incumbent LECs simply are not similarly situated with cable and other broadband providers in respect to either the benefits or the burdens associated with access regulation. In this regard, there is no merit to incumbent LECs unsupportable assertions that regulatory reform is necessary to encourage their investment in and deployment of DSL and other advanced services. As the Commission's most recent inquiries have confirmed, incumbent LECs are deploying advanced services at a blistering pace – DSL sales are growing at 3 times the rate of cable Internet sales, DSL service is available to *more* homes than cable Internet service, and analysts now forecast that there will soon be more DSL subscribers than cable Internet subscribers.[218]

If and when the incumbent LEC monopolies are broken and competitive local telephone markets emerge, it may well be appropriate to reconsider the need for regulation of access to the incumbents' networks. However, we are a long way from that point today.

A. As The Commission Has Consistently Recognized, Congress Imposed Very Different Regulatory Frameworks On Cable Networks And Telephone Networks.

Any discussion of "whether to impose the same regulations on different types of providers of high-speed services," NOI ¶ 45, must begin with the regulatory framework

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Order"); Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications* Capability, 15 FCC Rcd. 385 ¶ 11 (*"Section 706 Remand Order")*

[218] *See* Federal Communications Commission Releases Data On High Speed Services For Internet Access, FCC Press Release (October 31, 2000); Cable vs. DSL: Which One Is The Tortoise; Suddenly Phone Companies Look Poised To Take The Lead (citing a study by Cahners In-Stat of Scottsdale, Ariz.) <www.businessweek.com/2000/00_39/b3700073.htm?scriptFramed>); David Kravets, *DSL Throttles Modems in 1Q, Cable World*, at 8 (May 29, 2000) (2000 WL 12302944); Lawrence J. Magid, *Small Business Tools/Software, Technology and New Products to Help Your Company The ABCs of DSL: Options Abound in Fast Internet Access Service*, Los Angeles Times, at C6 (June 28, 2000).

established by Congress in the Communications Act. As explained above, Title VI of the Communications Act expressly precludes common carrier regulation of cable operators.

In contrast, Title II of the Communications Act expressly requires incumbent LECs to provide competitors nondiscriminatory access to their networks.[219] As the Commission has repeatedly held, "the facilities and equipment used by incumbent LECs to provide advanced services are network elements and subject to the obligations in section 251(c)(3)." *Section 706 Order* ¶ 11. The Commission has emphasized that excepting advanced services from these access regulations would be inconsistent with "Congress' aim to encourage competition in all telecommunications markets."[220] And section 10(a) of the Communications Act "expressly forbids the Commission from forbearing from the requirements of section 251(c) . . . 'until it determines that those requirements have been fully implemented.'"[221] Given the incumbent LECs' continued dominance of local telephone markets, there can be no serious claim that the requirements of section 251(c) have been fully implemented. Accordingly, the market-based approach required by law and policy in the context of cable networks is, at least for now, foreclosed as a matter of law in the context of incumbent LECs' local telephone networks.

B. There Are Strong Public Policy Reasons For Treating Incumbent LEC Telephone Networks Differently Than Cable And Other Networks.

Even if Congress had not spoken on this precise issue, there are sound public policy reasons for regulating incumbent LEC telephone networks differently than cable and other networks. As explained above, there are no competition problems for access regulation to solve

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[219] *See, e.g.*, Memorandum Opinion and Order, *Applications of Ameritech Corp, Transferor and SBC Communications, Inc., Transferee for Consent to Transfer Control of* Licenses, 14 FCC Rcd. 14712 ¶ 452 (1999) ("section 251[c] requires all incumbent LECs to provide nondiscriminatory access to their network facilities").

[220] *Section 706 Remand Order* ¶ 12. *See also Local Competition Order* ¶ 11 (observing that Congress determined that such access to incumbent networks and services was essential to permit "efficient entry into the monopolized local market").

in the cable context, and, thus, there are no possible benefits associated with such regulation. At the same time, inflexible cable access regulation could seriously undermine the delivery of advanced services over cable given the unique technology, cost, and quality of service implications of cable system architecture.

This calculus is exactly reversed with respect to incumbent LEC telephone networks. As explained below, access regulation is absolutely necessary if the incumbent LECs are to be prevented both from further entrenching their enduring local telephone monopolies and from leveraging those monopolies into broadband and other advanced services. On the other hand, there are no competitively significant burdens associated with maintaining the *status quo* of access regulation, as demonstrated in the marketplace by the incumbent LECs' enormous broadband investments and remarkable subscriber base growth.

1. The Incumbent LECs' Enduring Voice Monopolies Raise Competition Issues That Are Not Present In The Cable Context.

Incumbent LEC networks, especially the local loop, remain "a quintessential bottleneck facility for competing telecommunications carriers" that incumbents can, absent regulation, leverage to "perpetuate their monopolistic dominance of existing and emerging telecommunications markets." FCC DSL Br. at 22. Despite the efforts by Congress and the Commission, incumbent LECs face little competition, particularly for residential customers. Nearly five years after the Communications Act, incumbents retain nearly all of the customers.[222] The most recent Commission Industry Analysis shows that only about 0.4 percent of the incumbent LECs' 167 million switched access lines were provided to CLECs under UNE

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[221] *d at* ¶ 72 (*quoting* 47 U.S.C. § 160(d)).

[222] *See, e.g.*, *Bell Atlantic-GTE Merger Order* ¶ 104 (noting that "Bell Atlantic and GTE remain dominant within their traditional service areas"); Third Report and Order and Memorandum Op. and Order, *To Establish Rules And Policies For Local Multipoint Distribution Service And For Fixed Satellite Services*, 15 FCC Rcd. 11857, ¶ 10 (2000).

arrangements[223] – a principal means by which Congress intended to foster local broad-scale competition.[224] Indeed, the incumbent LECs' resistance to the market opening conditions of the Communications Act has proven so successful that the competitive LEC industry now stands on the verge of collapse. Competitive LECs have become "marginalized" because they do not "own the strategic assets" necessary to compete but must "rely on the ubiquitous Bell network" – a network that remains largely closed to new entrants.[225] "[I]nvestors [have] los[t] confidence in the fundamentals of the CLEC business model,"[226] "there has been 'carnage' among CLEC stocks,"[227] and numerous competitive LECs have filed (or are on the verge of filing) for bankruptcy.[228]

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[223] Industry Analysis Division, Trends in Telephone Service, at Table 9.4 (March 2000).

[224] Memorandum Op. and Order, *Application for Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York*, 15 FCC Rcd. 3953, ¶ 230 (1999) ("*Bell Atlantic-New York 271 Order*"). *See also* Memorandum Op. and Order, *Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide in-Region, InterLATA Services in South Carolina*, 13 FCC Rcd. 539, ¶ 195 (1997) ("*BellSouth South Carolina 271 Order*"); Memorandum Op. and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, ¶ 332 (1997) ("*Ameritech Michigan 271 Order*").

[225] Janet Whitman, *New Entrants: Battling the Bells*, Wall Street Journal, at R17 (Sept. 18, 2000). *See also* Brian Ploskina, *It's Open Season For CLEC Consolidators*, Interactive Week (Oct. 11, 2000) (reporting that competitive local exchange carriers are "facing hard times" because they are forced to rely "on the incumbent carriers").

[226] Mike Farrell, *ICG Tanks, Depressing Other CLECs*, Multichannel News (Oct. 2, 2000).

[227] John T. Mulqueen, *ICG Hit Hard by Revenue Shortfall, Resignations*, Interactive Week (Oct. 8, 2000). *See also id.* ("Another piece of the crumbling new carrier industry has plummeted to the ground").

[228] Paul Sherer, *Deals & Deal Makers: Too Much Telecom*, Wall Street Journal, at C1 (Aug. 15, 2000) ("[T]he telecom landscape is littered with troubled firms."); Jeff St.Onge, *Amer MetroComm Asks to Abandon Cisco Gear It Calls Faulty*, Dow Jones News Service (Oct. 10, 2000) (reporting on Aug. 23 Chapter 11 filing and ongoing bankruptcy proceedings); Jeff St. Onge, *A Bankruptcy Boom Is Starting To Have Ripple Effects*, Dow Jones News Service (Oct. 5, 2000) ("[I]n just the past few months, dozens of [ISPs] and telecom start-ups have filed for bankruptcy."); Heather Draper, *ICG's Tumble A Wake-Up Call to Telecom Firms*, Denver Rocky Mountain News, at 1G (Sept. 24, 2000) ("Certainly, ICG is at risk of bankruptcy and other CLECs will be in the same boat"); John T. Mulqueen, *Carrier's Purchasing Plans In Question*,